

**A Majujaya Holdings Sdn Bhd v Pens-Transteel Sdn Bhd
& Anor**

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-73-93

B ABDUL HAMID J
19 MAY 1993

Contract — Privity — Plaintiff/nominee not named as party to the contract — Right of nominee to sue — No evidence that other contracting party had accepted plaintiff as nominee — Whether plaintiff had locus standi to sue in its own name

C *Civil Procedure — Locus standi — Plaintiff was nominee of contracting party — Contracting party in liquidation — Whether plaintiff/nominee could sue in its own name — Authorization of liquidators required*

D *Civil Procedure — Injunction — Balance of convenience — Interlocutory order for appointment of liquidators — Order would substantially satisfy the main order prayed for without a trial*

E A joint venture agreement ('the agreement') was entered into between Transteel Pty Ltd, a company incorporated in Australia, or its nominee, and the second defendant, Pens Holdings Sdn Bhd. Pursuant to the agreement, the first defendant was formed. In the minutes of the third board meeting of the first defendant held on 14 March 1991, there appeared the following items: (1) the board accepted that Transteel Australia Pty Ltd, was the correct operative instrument in the original agreement; and (2) the invoking of the nominee clause would be accepted as in the original agreement. On 26 March 1991, one Andrew Pavloff, who signed as a director of Transteel Pty Ltd but using the letterhead of Transteel Australia Pty Ltd, wrote to the second defendant stating that it was appointing the plaintiff as its nominee. On 26 June 1991, Transteel Pty Ltd went into voluntary winding-up. The defendants were not informed of this fact, but they came to know about it on 15 February 1993 when they did a company search in Australia. The second defendant terminated the agreement. On 5 March 1993, the plaintiff filed a writ of summons claiming, inter alia, for injunctions, for the first defendant to be wound up and for an order for appointment of liquidators. On the following day, the plaintiff applied for and obtained ex parte interlocutory injunctions which were set aside on 15 March 1993. There was no appeal against that order. On 13 April 1993, the plaintiff filed an application titled 'summons for appointment of liquidator' praying for an order that two named persons be appointed liquidators of the first defendant and costs. The defendants contended that the plaintiff had no locus standi in this suit.

I **Held**, dismissing the application:

(1) The court was not satisfied on the evidence before it that the plaintiff had proved on the balance of probabilities that the second

defendant, the contracting party to the agreement, had accepted the plaintiff as the nominee of Transteel Pty Ltd, the other contracting party. The second defendant must accept the plaintiff as a nominee before the plaintiff, if at all, can be a party to the contract and sue on it. The second defendant could not have entered into an agreement with a party (the nominee/plaintiff) whose identity was not then known. Therefore, the plaintiff had no locus standi to commence this action in its own name.

- (2) The contracting party was Transteel Pty Ltd and as it was presently under liquidation, its liquidators should sue. There was no evidence that the liquidators had given the plaintiffs authorization to sue.
- (3) The order prayed for, although interlocutory in nature, would substantially satisfy the main order prayed for in the main suit and the court should also consider the balance of convenience. The plaintiff was a S\$2 company seeking to have liquidators appointed, without a trial, for the first defendant which was in sound financial position with ongoing projects worth millions of ringgit and with 295 employees. The court was of the view that even if the plaintiff were to succeed eventually, the defendants were in a position to satisfy whatever judgment sum, damages and costs of the plaintiff but the same could not be said of the plaintiff.

[Bahasa Malaysia summary]

Suatu perjanjian usaha sama ('perjanjian itu') telah dimasuki di antara Transteel Pty Ltd, sebuah syarikat yang diperbadankan di Australia, atau namaannya, dan defendan kedua, Pens Holdings Sdn Bhd. Defendan pertama telah ditubuhkan di bawah perjanjian itu. Dalam minit mesyuarat lembaga pengarah defendan pertama yang telah diadakan pada 14 Mac 1991, dicatatkan perkara-perkara berikut: (1) lembaga menerima Transteel Australia Pty Ltd sebagai pihak yang betul dalam perjanjian asal; dan (2) penggunaan fasal namaan akan diterima seperti dalam perjanjian asal. Pada 26 Mac 1991, Andrew Pavloff, yang menandatangani sebagai pengarah Transteel Pty Ltd tetapi menggunakan kepala surat Transteel Australia Pty Ltd, telah menulis kepada defendan kedua dan memberitahunya bahawa ia telah melantik plaintif sebagai namaannya. Pada 26 Jun 1991, Transteel Pty Ltd telah digulung secara sukarela. Defendan tidak diberitahu mengenai fakta ini tetapi telah mengetahuinya pada 15 Februari 1993 apabila mereka membuat carian syarikat di Australia. Defendan kedua telah menamatkan perjanjian itu. Pada 5 Mac 1993, plaintif telah memfailkan suatu writ saman menuntut, antara lain, untuk injunksi, defendan pertama digulung dan untuk suatu perintah perlantikan penyelesaian. Pada hari berikutnya, plaintif telah memohon dan mendapat injunksi interlokutori ex parte yang kemudiannya telah diketepikan pada 15 Mac 1993. Tiada rayuan yang dibuat ke atas perintah itu. Pada 13 April 1993, plaintif telah memfailkan satu permohonan bertajuk 'summons for appointment of liquidator' dan memohon untuk suatu perintah supaya dua orang yang dinamakan dilantik sebagai penyelesaian

- A defendan pertama dan kos. Defendan menegaskan bahawa plaintif tidak mempunyai locus standi.

Diputuskan, menolak permohonan itu:

- B (1) Mahkamah tidak berpuas hati berdasarkan keterangan yang ada di hadapannya bahawa plaintif telah membuktikan atas imbalan kebarangkalian bahawa defendan kedua, iaitu satu pihak kepada perjanjian itu, telah menerima plaintif sebagai namaan Transteel Pty Ltd, iaitu pihak yang lain kepada perjanjian itu. Defendan kedua mesti menerima plaintif sebagai suatu namaan sebelum plaintif, jikalau boleh, dapat menjadi pihak kepada perjanjian itu dan membawa suatu dakwaan ke atasnya. Defendan kedua tidak mungkin mengikat perjanjian dengan satu pihak (namaan/plaintif) yang tidak dikenali identitinya pada masa itu. Oleh itu, plaintif tidak mempunyai locus standi untuk memulakan tindakan ini dalam namanya sendiri.
- D (2) Pihak yang memasuki perjanjian itu ialah Transteel Pty Ltd dan oleh kerana ia sekarang berada di dalam penyelesaian, penyelesaian yang patut membawa dakwaan ini. Tiada bukti yang menunjukkan bahawa penyelesaian telah memberi kebenarannya kepada plaintif untuk membawa pendakwaan.
- E (3) Walaupun perintah yang dipohon itu bersifat interlokutori, ia akan memuaskan sebahagian besar perintah yang dipohon di dalam guaman utama dan mahkamah patut mempertimbangkan imbalan kemudahan (balance of convenience). Plaintif ialah sebuah syarikat S\$2 yang kini mencuba melantik seorang penyelesaian tanpa perbicaraan, untuk defendan pertama yang berada di dalam keadaan kewangan yang kukuh dengan projek-projek berjumlah berjuta-juta ringgit yang sedang dilaksanakan dan kakitangan yang berjumlah 295 orang. Jikalau plaintif akhirnya berjaya juga, mahkamah berpendapat bahawa defendan berada dalam keadaan di mana mereka akan dapat memuaskan apa-apa jumlah kehakiman, ganti rugi dan kos tetapi ini tidak boleh dikatakan tentang plaintif.]
- F
- G

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-292-93.]

Notes

- H For cases on locus standi, see 2 *Mallal's Digest* (4th Ed) paras 1508-1510.

For cases on the balance of convenience in injunctions, see 2 *Mallal's Digest* (4th Ed) paras 1020, 1021, 1094, 1099, 1107, 1116, 1117, 1119 and 1156.

I

Cases referred to

- 1 *Re Ismail bin Rentah decd; Haji Hussain bin Singah v Liah bte Lerong & Ors* [1940] MLJ 98 (distd)

Rhina Bhar (Rumi Maneksha with her) (Rhina Bhar & Associates) for the plaintiff. A

Wong Chong Wah (Leong Wai Hong with him) (Skrine & Co) for the defendants.

Abdul Hamid Mohamed J: By a writ of summons filed on 5 March 1993, the plaintiff claimed for injunctions; for the first defendant to be wound up; for an order that a liquidator be appointed; damages; and costs. B

On the following day, the plaintiff filed a 'summons for interlocutory injunction'. The injunctions prayed for were granted *ex parte* on the same day. However, on the application of the defendants, they were set aside on 15 March 1993. There was no appeal against that order. C

On 24 March 1993, the plaintiff filed its statement of claim. Defence was filed on 12 April 1993.

On 13 April 1993, the plaintiff filed this application. The summons is entitled 'summons for appointment of liquidator', praying for an order that two named persons be appointed liquidators of the first defendant and costs. D

I heard the arguments on 27 April 1993 and reserved my judgment to 7 May 1993.

However, without leave of the court and later objected to by counsel for the defendants, counsel for the plaintiff, Ms Rhina Bhar, herself affirmed and filed an affidavit. She also delivered a 'chart', which is actually a summary of facts, clearly in answer to the points raised during the argument. (This is not the first time she did this. Earlier on when I reserved my decision in respect of the application to set aside the *ex parte* injunction, she also delivered a 'summary of points'.) E

I think that this is not proper. I disregard the affidavit and the 'chart'.

I have some difficulty trying to understand the nature of this application. This is because the learned leading counsel for the plaintiff, Mr Rumi Maneksha, said that it was not an application for summary judgment, but at the same time it was also not an interlocutory application. If it is neither, then what is it? F

I accept that it is not an application for summary judgment because there are other prayers prayed for in the statement of claim. But the summons, which for all intents and purposes is a summons-in-chambers, does not pray for an interim order until the disposal of the suit. However, the affidavit in support of this application does say that the order prayed for is 'pending the hearing of the action.' G

So I take it that this is an application for an interim order until the determination of the suit. H

The plaintiff's application seems to me to be based on the following premises:

- (a) Transteel Pty Ltd, a company incorporated in Victoria, Australia or its nominee, entered into a joint venture agreement ('the agreement') with Pens Holdings Sdn Bhd ('the second defendant'). I
- (b) Pursuant to the agreement, a company called Pens-Transteel Sdn Bhd ('the first defendant') was formed.

- A (c) Transteel Pty Ltd appointed the plaintiff as its nominee.
(d) Clause 24 of the agreement provides for termination of the agreement.
(e) Clause 25 of the agreement provides for the appointment of the liquidator to carry out the liquidation of the first defendant if the agreement is terminated.
- B (f) The second defendant has terminated the agreement.
(g) Therefore a liquidator must be appointed.

Put that way, it appears that the facts are fairly straightforward. But the truth is that they are not.

Learned counsel for the defendants argued that the plaintiff had no locus standi in this suit.

- C The plaintiff brought this action on the basis that it is the nominee of Transteel Pty Ltd, a party to the agreement — see para 4 of the statement of claim.

Perhaps the relevant facts which can be gathered from the various affidavits and documents, which are undeniable, or as found by me, should be reproduced in order to appreciate the true position.

- D The agreement was entered into between Transteel Pty Ltd *or its nominee*.

In the minutes of the third board of directors' meeting of the first defendant (the company formed pursuant to the agreement) held on 14 March 1991, there appears the following items:

- E ...
(d) The board accepted that Transteel *Australia* Pty Ltd is the correct operative instrument in the original agreement.
(e) The invoking of the nominee clause will be accepted as in the original agreement. (Emphasis added.)

- F On 26 March 1991, one Andrew Pavloff, who signed as a director of Transteel Pty Ltd but using the letterhead of Transteel *Australia* Pty Ltd, wrote to the second defendant saying that it was appointing the plaintiff as its nominee.

- G According to a document entitled 'company extract' (exh A2 of encl 18), a certain company (its previous name unknown) began to use the name of 'Transteel *Australia* Pty Ltd' from 3 May 1991. According to that document, Andrew Pavloff, who signed the letter dated 26 March as director of Transteel *Pty* Ltd but using the letterhead of Transteel *Australia* Pty Ltd, was also a director of Transteel *Australia* Pty Ltd.

- H On 26 June 1991, Transteel *Pty* Ltd went into voluntary winding-up. The defendants were not informed of this fact. The defendants only came to know about it on 15 February 1993 when they did a company search in Australia.

- I In the course of the argument, I asked the leading counsel for the plaintiff as to how Transteel *Australia* Pty Ltd came into the picture bearing in mind that Transteel *Pty* Ltd was the party to the agreement. He said that Transteel *Pty* Ltd changed its name to Transteel *Australia* Pty Ltd. However, he was interrupted by Ms Rhina Bhar who appeared with him for the plaintiff. She clarified that that was not so. It was another company by the name of Dramdon Pty Ltd which changed its name to Transteel *Australia*.

I must note here that on the evidence then before the court, there was no evidence whatsoever of that fact. Later on, I asked the question as to how Dramdon Pty Ltd, which changed its name to Transteel *Australia*, came into the picture.

It was this gap which Ms Rhina Bhar sought to cover by filing her affidavit, without leave of the court, after the hearing had completed which in my opinion was improper and I have excluded it.

The plaintiff relied heavily on the minutes of the board of directors' meeting of the first defendant held on 14 March 1991 to give itself locus standi.

But it must be emphasized that those are minutes of the first defendant, the company formed by the parties to the agreement under the agreement. They are not minutes of the second defendant, the party to the agreement. Therefore it is not correct to say that the second defendant had accepted the appointment of the plaintiff as a nominee of Transteel Pty Ltd. Further, Transteel *Australia* Pty Ltd only came into existence *by that name* on 3 May 1991. How could it be 'accepted ... [as] the correct operative instrument in the original agreement' before it came into existence?

Regarding the letter dated 26 March 1991, why did Andrew Pavloff who signed the letter as a director of Transteel Pty Ltd use the letterhead of Transteel *Australia* Pty Ltd? Indeed in his affidavit, the chairman of the first defendant averred that when the board of directors of the first defendant adopted the resolutions on 14 March 1991, they believed that Transteel *Australia* Pty Ltd was Transteel Pty Ltd. In the circumstances, I do not think that they can be blamed for it.

In less than two months after Transteel *Australia* Pty Ltd adopted that name, Transteel Pty Ltd was put into voluntary winding-up. Why? And why were the defendants not told? The defendants only discovered it about 20 months later after making a search in Australia.

Transteel Pty Ltd was wound up on 26 June 1991. The defendants' solicitors had written to the plaintiffs' solicitors as to whether the latter had instructions to act for the liquidator of Transteel Pty Ltd. There was no reply. The defendants' solicitors had also not received any reply from the liquidators of Transteel Pty Ltd.

In the circumstances, I am not satisfied on the evidence now before me that the plaintiff has proved on the balance of probabilities that the second defendant, the contracting party to the agreement had accepted the plaintiff as the nominee of Transteel Pty Ltd, the other contracting party. The second defendant must accept the plaintiff as a nominee before the plaintiff, if at all, can be a party to the contract and sue on it.

The next point, but still on locus standi, is whether a nominee, assuming that the plaintiff has been accepted as nominee, may sue in its own name. The plaintiff's case is that the agreement states that it was made between 'Transteel Pty Ltd or its nominee' and the second defendant. Therefore, the plaintiff can sue in its own name.

First, I find this agreement rather peculiar. The word 'nominee' appears only once in the agreement, that is in that part which states who the parties to the agreement are. In brief, it says that it is an agreement between

- A Transteel *Pty* Ltd or its nominee on the one part and the second defendant on the other part. Who are/were the party/parties entering into the agreement on the first part? Only Transteel *Pty* Ltd is known. The 'nominee' was not known. How could a party whose identity was not known enter into an agreement? With whom was the second defendant entering into an agreement? Only Transteel *Pty* Ltd was known to the second defendant.
- B How could the second defendant be entering into an agreement with a party (the nominee) whose identity was not then known?

Learned counsel for the defendants argued that the plaintiff, a nominee (assuming that it is) cannot sue in its own name. The principal should sue, he said. He referred me to the case of *Re Ismail bin Rentah decd; Haji Hussain*

- C *v Liah bte Lerong & Ors*.¹

Unfortunately, I find that that case is of no assistance on this point. With limited time and books, I am unable to get any guidance on the point.

In the circumstances, I prefer to decide on the facts of this case, ie in accordance with the agreement. The contracting party is Transteel *Pty* Ltd. So it is Transteel *Pty* Ltd which should sue or be sued. Now that it is under liquidation, it is the liquidator who should sue. In the case, on evidence before me, there is not even an authorization by the liquidators. Even the plaintiff's solicitors have chosen to remain silent to the query by the defendants' solicitors as to whether the former has authority to act from the liquidators of Transteel *Pty* Ltd.

- E On this ground too, I am of the view that the plaintiff has no locus standi to commence this action in its own name.

As if to circumvent the question of liquidation of Transteel *Pty* Ltd, it was stressed that it was Transteel *Pty* Ltd that was liquidated, not Transteel Australia *Pty* Ltd. As I understand it, by so doing, the plaintiff is saying that Transteel Australia *Pty* Ltd is Transteel *Pty* Ltd. The plaintiff is Transteel Australia's nominee, therefore the question of authorization by the liquidator of Transteel *Pty* Ltd does not arise.

- F But, whose nominee is the plaintiff, if it is a nominee? Transteel *Pty* Ltd's? Or Transteel Australia *Pty* Ltd's?

By its own pleading (see in particular para 4 of the statement of claim), the plaintiff says that it is the nominee of the Transteel *Pty* Ltd. Further,

- G Transteel Australia *Pty* Ltd is not a party to the agreement. How could it appoint a nominee pursuant to the agreement? Again, the letter of 26 March 1991 appointing the plaintiff as nominee was signed by Andrew Pavloff as a director of Transteel *Pty* Ltd. Definitely the plaintiff cannot now say it is a nominee of Transteel Australia *Pty* Ltd.

- H So much on locus standi. Let me now turn to another point.

Learned counsel for the plaintiff stressed that the right to appoint a liquidator is contractual. No other consideration should be given. Yet he went only to show that there was oppression.

I I am of the view that as the order prayed for, being interlocutory in nature but with far-reaching effect, would substantially satisfy the main order prayed for in the main suit, the court should also consider the balance of convenience. On the one hand, we have the plaintiff, a \$2 (Singapore) company which claims to be a nominee of an Australian company which

went into voluntary winding up about four months after entering into the agreement and less than two months after another company purported to have assumed its name. It is seeking to have a liquidator appointed for the joint venture company (the first defendant), which is in a sound financial position, with ongoing projects worth millions of ringgit and with 295 employees, without a trial.

I am also of the view that if the plaintiffs were to succeed eventually, the defendants are in a position to satisfy whatever judgment sum, damages and costs of the plaintiff. I do not think the same can be said about the plaintiff.

In the circumstances, besides the question of locus standi, I do not think it is just that the order prayed for should be made without even a trial.

The application is dismissed with costs.

Application dismissed.

Reported by Yap Foo Ken
